No. 2886.

United States
Circuit Court of Appeals
Ninth Circuit.

VINEYARD LAND & STOCK COMPANY, A CORPORATION; AND THE UTAH CONSTRUCTION COMPANY, A CORPORATION

Appellants,

vs.

TWIN FALLS, OAKLEY LAND AND WATER COMPANY, A CORPORATION; AND OAKLEY CANAL COMPANY, A CORPORATION,

Appellees.

Brief for Appellants.

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Brief for Appellants.

(Figures in parentheses refer to pages of printed transcript.)

STATEMENT OF THE CASE.

This suit was brought by the appellees, Twin Falls Oakley Land and Water Company and Oakley Canal Company, against appellants, Vineyard Land and Stock Company, and The Utah Construction Company, and involves conflicting claims of rights in and to the waters of Goose Creek, an interstate stream whose course extends through the northern part of Elko County, Nevada, into and through the southerly part of Cassia County, Idaho.

Appellee, Twin Falls Oakley Land and Water Company, is a corporation of Delaware, and appellee, Oakley Canal Company, is an Idaho corporation. Both appellants are Utah corporations. Hereafter we will refer to appellees as plaintiffs and appellants as defendants.

Plaintiffs in their bill allege in substance (7-21) that plaintiff, Twin Falls Oakley Land and Water Company, was organized for the purpose of constructing irrigation works in the State of Idaho, under a contract with said State, and that plaintiff, Oakley Canal Company, was organized for the purpose of taking over and operating the works when constructed; that said works were to be constructed in accordance with the provisions of said contract with the State of Idaho (22-39) for the purpose of irrigating approximately 44,000 acres of land in Cassia County, Idaho, from the waters of said Goose Creek; that said works, consisting of a reservoir and distributing system, had been fully completed according to the contract; that plaintiff, Twin Falls Oakley Land and Water Company, was the holder of two permits from the State Engineer of the State of Idaho, one number 3751 for 500 cubic feet per second, and the other number 4731 for 1,000 cubic feet per second, of the waters of said Goose Creek. That the applications for said permits were filed respectively on the 27th day of March, 1908, and the 10th day of March, 1909. That in addition to the rights evidenced by said permits, plaintiffs were also the

owners of the right to use 300 second feet of the waters of said Goose Creek under rights acquired from individuals who had appropriated said waters before any other rights had been acquired in or to the waters of said stream; that the waters to which plaintiffs were entitled under their several rights referred to are, and in the future would be, needed for the irrigation of the lands under plaintiffs' system. That the defendant, Vineyard Land and Stock Company, had constructed and was at the time of the commencement of the action, engaged in the construction of canals and ditches in the State of Nevada for the purpose of using the waters of said Goose Creek upon lands belonging to said defendant and for the purpose of preventing the same from flowing into the State of Idaho for use there by plaintiffs and the stockholders of said Oakley Canal Company; that said defendant would, unless prevented from so doing by the decree of the Court, prevent the use of said waters by said plaintiffs or the stockholders of said Oakley Canal Company; that plaintiffs were unable to ascertain the exact nature or extent of the claim made by the defendants to the right to use the waters of said stream, but that all of defendant's rights therein were subsequent and subject to the rights of plaintiffs and the stockholders of said Oakley Canal Company, which rights aggregate 1800 second feet, being the entire flow of said stream and its tributaries above plaintiffs' point of diversion; that

both defendants are the owners of lands in the State of Nevada, and that defendant, The Utah Construction Company, is the owner of nearly all of the capital stock of the defendant, Vineyard Land and Stock Company, and controls and directs its operations.

Plaintiffs prayed that their rights and the rights of those claiming under them in and to the use of the waters of said Goose Creek, be adjudged and decreed to be prior and superior to the rights of the defendants, and that plaintiffs' right and title to the use of said water be determined and quieted; that the defendants, their agents, servants and successors in interest, be forever enjoined and restrained from diverting and using the waters of said Goose Creek, or any of the tributaries thereof, above plaintiffs' point of diversion, and that a temporary restraining order be issued pending suit.

The defendants in their answer to the bill (51-65) admitted the allegations therein concerning the corporate existence of the parties; alleged that the defendants were without knowledge concerning any of the matters connected with the plaintiffs' alleged acquisition of water rights in Goose Creek by appropriation or private grant; admitted that Goose Creek, above plaintiffs' place of diversion, is formed by various small streams and creeks having their sources in the main in the State of Nevada, but to some extent in the State of Idaho, and that its tributaries flow together in the State of Nevada, forming said Goose Creek, and from thence that said stream flows northward into said Cassia County, Idaho, and empties into

Snake River in said State; admitted that the Vineyard Land and Stock Company had constructed and at the time of the filing of the bill was engaged in constructing canals and ditches in the State of Nevada, for the purpose of diverting and using the waters of Goose Creek and its tributaries; denied that the purpose thereof was to prevent plaintiffs, or the stockholders of said Oakley Company from using whatever waters from said streams they or either of them were entitled to; denied that the rights to said waters of the defendant Vineyard Land and Stock Company, as set forth in the answer, were subsequent or subject to the rights of the plaintiffs, or either of them; admitted that defendant, The Utah Construction Company, was at the time of the commencement of said suit, the owner of nearly all of the capital stock of the said Vineyard Land and Stock Company, but denied that it controls or directs the operations of said Vineyard Land and Stock Company; alleged that about 6,000 acres of land belonging to the said Vineyard Land and Stock Company are located along and adjacent to said Goose Creek and its tributaries in the State of Nevada, and that said lands were high and arid and not suitable for tillage or cultivation or for the growing of crops without irrigation; that said 6,000 acres were so located as to be susceptible of irrigation from the waters of Goose Creek and its tributaries and that the same when so irrigated were capable of producing valuable crops of wild hay, alfalfa, grain and vegetables; that said 6,000 acres of land are the only lands in the State of

Nevada capable of being irrigated from the waters of said Goose Creek and its tributaries, and that no more than a fair and equitable proportion of the said waters would be required for the irrigation thereof; that practically all of said lands are situated within one-half mile from the channels of said streams and that if the waters thereof were diverted to and upon said lands for irrigation purposes, the same, with the exception of a comparatively small quantity thereof, would immediately flow back into the said channels and thence into the plaintiffs' reservoir; that the defendant, Vineyard Land and Stock Company, claims the right to the use of all of the waters of Goose Creek and its tributaries to which the State of Nevada and its citizens and landholders are entitled under a fair and equitable apportionment between the State of Nevada and its citizens and land holders and the State of Idaho, and its citizens and land holders; that long prior to the date of the alleged appropriation of the waters of Goose Creek and its tributaries by plaintiffs, the predecessors in interest of the Vineyard Land and Stock Company entered upon said streams and by means of dams, canals and ditches appropriated and diverted for irrigation purposes about 40 second feet of the waters thereof. That at the time of filing the answer the defendant, Vineyard Land and Stock Company, had under cultivation about 4,000 acres of said land, and by means of dams, canals and ditches had appropriated and diverted and used of the waters of said Goose Creek and its tributaries approximately 80 second feet.

The issues so presented were tried in April, 1915. The Court rendered its decision in writing (278-284) on December 11th, 1915, and made and entered its decree, (284-293) from which this appeal is taken, on the 30th day of March, 1916. The Court decreed to plaintiffs water rights aggregating 145,200 acre feet, with priorities as follows (285):

825 acre feet under their appropriation made May 1st, 1878.

275 acre feet under their appropriation made May 1st, 1879.

687.5 acre feet under their appropriation made May 1st, 1880.

2337.5 acre feet under their appropriation made May 1st, 1882.

1375 acre feet under their appropriation made May 1st, 1883.

8250 acre feet under their appropriation made May 1, 1884.

4125 acre feet under their appropriation made May 1, 1888.

500 cubic feet per second by virtue of their appropriation made March 27, 1908, under permit number 3751.

600 cubic feet per second under their appropriation made March 10, 1909, under permit number 4731.

To the defendants the Court decreed rights as follows:

200 acre feet under their appropriation made May 1, 1875, for use on their Winecup ranch.

650 acre feet under their appropriation made May 1st, 1883, for use on their Grande ranch.

250 acre feet under their appropriation made May 1st, 1886, for use on their Winecup ranch.

150 acre feet under their appropriation made May 1st, 1889, for use on their Grande ranch.

400 acre feet under their appropriation made May 1st, 1900, for use one-half on the Winecup ranch and one-half on the Grande ranch.

285 acre feet under their appropriation made May 1st, 1904, for use on their Spring Creek ranch.

The Court decreed that no one holding a subsequent appropriation should be entitled to receive water until all prior appropriations had been fully satisfied; that within the amounts of their annual rights, defendants might divert for use upon their lands (in Nevada) at the rate of not more than six and one-half cubic feet per second for defendants' property known as the Winecup ranch, and not more than nine cubic feet per second for the property known as the Grande ranch, and not to exceed two and one-half cubic feet per second upon defendants' property known as the Spring Creek ranch; it was decreed that defendants be perpetually enjoined from using any more water or any water in any different manner from that prescribed by the provisions of the de-

cree; that all waters diverted by the defendants be measured at the points of diversion from the natural channel, and that no waters could be diverted except through conduits so constructed as to accurately measure the water; that the defendants install measuring devices at their several points of diversion along the stream and its tributaries (in Nevada), all such devices to be of such design as to automatically register the amounts of water diverted; that such measuring devices should at all times be subject to the reasonable inspection of plaintiffs, and that plaintiffs should have the right to go upon and over the lands of defendants (in Nevada) where such measuring devices are situated, to inspect the same.

By the provisions of the decree the court retained jurisdiction (292) of the cause for the purpose of making reasonable rules touching the manner of diverting, measuring and distributing the waters and devices to be installed and used for such purposes, and for the purpose of directing that the parties keep accurate and detailed records of the amounts of water diverted, and to require reports to be filed from time to time of the amounts so diverted, and to appoint commissioners or water masters to make distribution in accordance with the terms of the decree.

The decree also specifically describes, by legal subdivisions, the particular tracts of land in the State of Nevada, upon which the defendants would be permitted to use the waters awarded to them in the decree.

To the defendants the Court decreed rights as follows:

200 acre feet under their appropriation made May 1, 1875, for use on their Winecup ranch.

650 acre feet under their appropriation made May 1st, 1883, for use on their Grande ranch.

250 acre feet under their appropriation made May 1st, 1886, for use on their Winecup ranch.

150 acre feet under their appropriation made May 1st, 1889, for use on their Grande ranch.

400 acre feet under their appropriation made May 1st, 1900, for use one-half on the Winecup ranch and one-half on the Grande ranch.

285 acre feet under their appropriation made May 1st, 1904, for use on their Spring Creek ranch.

The Court decreed that no one holding a subsequent appropriation should be entitled to receive water until all prior appropriations had been fully satisfied; that within the amounts of their annual rights, defendants might divert for use upon their lands (in Nevada) at the rate of not more than six and one-half cubic feet per second for defendants' property known as the Winecup ranch, and not more than nine cubic feet per second for the property known as the Grande ranch, and not to exceed two and one-half cubic feet per second upon defendants' property known as the Spring Creek ranch; it was decreed that defendants be perpetually enjoined from using any more water or any water in any different manner from that prescribed by the provisions of the de-

cree; that all waters diverted by the defendants be measured at the points of diversion from the natural channel, and that no waters could be diverted except through conduits so constructed as to accurately measure the water; that the defendants install measuring devices at their several points of diversion along the stream and its tributaries (in Nevada), all such devices to be of such design as to automatically register the amounts of water diverted; that such measuring devices should at all times be subject to the reasonable inspection of plaintiffs, and that plaintiffs should have the right to go upon and over the lands of defendants (in Nevada) where such measuring devices are situated, to inspect the same.

By the provisions of the decree the court retained jurisdiction (292) of the cause for the purpose of making reasonable rules touching the manner of diverting, measuring and distributing the waters and devices to be installed and used for such purposes, and for the purpose of directing that the parties keep accurate and detailed records of the amounts of water diverted, and to require reports to be filed from time to time of the amounts so diverted, and to appoint commissioners or water masters to make distribution in accordance with the terms of the decree.

The decree also specifically describes, by legal subdivisions, the particular tracts of land in the State of Nevada, upon which the defendants would be permitted to use the waters awarded to them in the decree.

The following is a general statement of points involved in this appeal and raised by the assignment of errors herein:

1. The bill should have been dismissed as to the defendant, The Utah Construction Company.

2. The decree erroneously awarded plaintiffs water rights under alleged grants from private individuals who, it was claimed, had appropriated said waters long prior to the organization of the plaintiff companies. This statement refers to all of the waters decreed to plaintiffs with the exception of the rights acquired under the applications filed by or in behalf of plaintiffs on the 27th day of March, 1908, and the 10th day of March, 1909, respectively. Appellants also insist that even if the Court did not err in awarding plaintiffs these rights, or some of them, it did err, nevertheless, with respect to the quantities of water awarded plaintiffs and with respect to some of the dates of priorities given to those rights by the decree.

3. The decree is erroneous with respect to the quantities and priorities adopted by the Court in defining the vested rights of the defendant, Vineyard Land and Stock Company. This point involves the finding of the Court with respect to the duty of water on defendants' lands. That is to say, the Court found the duty of said water to be two acre feet for pasture and three acre feet for hay and grain land, whereas the great weight of the evidence is to the effect that the duty of water for the pasture and hay land is not less than four acre feet per acre.

4. The Court erroneously attempted by its decree to exercise jurisdiction over the property of the defendant, Vineyard Land and Stock Company, in the State of Nevada, and to regulate and control the internal affairs of said defendant in said state. Among other things, the decree erroneously provides that the waters awarded to the defendants could be used only upon certain described tracts of land in the State of Nevada; that said waters could be diverted from the natural channel only through ditches and canals "so constructed that water can be accurately measured;" that the defendants would not be permitted to irrigate their lands by means of the methods used by them and their predecessors in interest in the past; that is to say, by placing dams in the channel of the stream and in swails and sloughs leading therefrom and thereby causing certain of said lands to be flooded without the use of artificial ditches; that the defendants should place in all of the ditches and channels used by them for the purpose of diverting water onto their said lands,

> "uniform measuring devices at their several points of diversion along the stream and its tributaries, all of such devices to be of such design as to automatically register the amounts of water diverted;"

that all of such measuring devices and guages should at all times be subject to the inspection of plaintiffs and that plaintiffs should have access to the premises of the defendants in the State of Nevada for the purpose of inspecting said devices; in other words, it was provided that the officers, agents and employees

of the plaintiffs were to have the right (in effect an easement) to go upon and over the lands of the defendants in the State of Nevada for the purposes mentioned.

The Court also erroneously attempted to prescribe the sizes of irrigation streams that the defendants might use at their several ranches for the irrigation thereof.

5. It was erroneously provided in the decree that the Court should retain jurisdiction of the cause for the purpose of making reasonable rules touching the manner of diverting, measuring and distributing the waters and of regulating the devices to be installed for that purpose, as well as of directing the defendants to keep accurate and detailed records of the amounts of water diverted and used by them, and to file reports thereof from time to time; also to enable the Court to appoint commissioners or water masters to go upon defendants' lands (in Nevada) for the purpose of making distribution of the waters according to the terms of the decree.

SPECIFICATION OF ERRORS RELIED UPON.

The assignment of errors by which the points above referred to are raised on this appeal are as follows:

I.

"The Court erred in decreeing to plaintiffs any of the waters of said Goose Creek and its tributaries, with the exception of such said waters, to-wit, about 30,000 acre feet thereof, as plain-

tiffs are entitled to under permits issued by the State Engineer of the State of Idaho, being respectively, permit number 3751, dated March 27, 1908, and permit number 4731, dated March 10, 1909. (294-95.)

II.

"Even if the Court did not err in decreeing to plaintiffs water rights in said streams other than those to which plaintiffs are entitled under said permits No. 3751 and No. 4731, respectively, the Court erred nevertheless in decreeing to plaintiffs water from said streams, other than as follows:

450 acre feet dating from May 1st, 1878;
150 acre feet dating from May 1st, 1879;
300 acre feet dating from May 1st, 1881;
1350 acre feet dating from May 1st, 1883;
6755 acre feet dating from May 1st, 1888; and
21025 acre feet under said permits No. 3751 and No. 4731. (295.)

III.

"The Court erred in making and entering said decree, in awarding and decreeing to plaintiffs the right to the use of any of the waters of said Goose Creek and its tributaries as a prior right to the rights of the defendant Vineyard Land and Stock Company in and to said waters. (295.)

IV.

"The Court erred in making and entering said decree, in not holding that the defendant Vineyard Land and Stock Company had the following rights to the use of the waters of said streams:

400.0 acre feet, dating from the year 1875;
1018.4 acre feet, dating from May 1st, 1883;
962.0 acre feet, dating from May 1st, 1886;
15.6 acre feet, dating from May 1st, 1888;
393.6 acre feet, dating from May 1st, 1889; and
1418.4 acre feet, dating from various dates between the year 1890 and January 1st, 1906. (295-296.)

V.

"The Court erred in making and entering said decree in enjoining the defendant Vineyard Land and Stock Company from using the waters of said streams to which it is entitled upon the lands of said defendant susceptible of irrigation from the waters of said streams other than the lands specifically mentioned and described in said decree. (296.)

VI.

"The Court erred in limiting and restricting the defendant Vineyard Land and Stock Company with reference to the sizes of irrigation streams to be used by it in the irrigation of its

lands in the State of Nevada from the waters of said Goose Creek and its tributaries. (296.)

VII.

"The Court erred in decreeing absolutely to the plaintiffs any of the waters of Goose Creek and its tributaries in excess of the quantity, to-wit, about 30,000 acre feet, which has been used by plaintiffs for beneficial purposes, and in enjoining the defendant Vineyard Land and Stock Company from using any of such excess waters prior to the actual application of the same by plaintiffs to the beneficial uses for which said waters are claimed; and in making and entering any decree herein with respect to such excess waters, except to determine the amount thereof that can be diverted through plaintiffs' works, and the priority of the same, and to set a time within which such amount of such excess shall, subject to the rights of the defendant, be applied by plaintiffs to the purposes for which same is claimed. (297.)

VIII.

"The Court erred in making and entering its decree herein enjoining the defendant Vineyard Land and Stock Company from changing the points of diversion and places of use of the waters of said Goose Creek and its tributaries, in the State of Nevada, as authorized by the laws of said State. (297.)

IX.

"The Court erred in making and entering its decree herein enjoining the defendant Vineyard Land and Stock Company from irrigating its lands in the State of Nevada by means of dams placed in the natural channels of said Goose Creek and its tributaries, and in sloughs and other channels leading therefrom, thereby flooding said lands without the use of artificial canals, ditches and conduits, and in enjoining the defendant Vineyard Land and Stock Company from diverting any of the waters of said stream or its tributaries, except by means of ditches or other devices provided with automatic guages. (297.)

X.

"The Court erred in making and entering its decree herein requiring the defendant Vineyard Land and Stock Company to install in all of its ditches, canals and conduits, in the State of Nevada, automatic measuring devices for measuring all waters used by the said defendant from said streams, in said state, and in decreeing that all such measuring devices and guages shall at all times be subject to the inspection of plaintiffs; and in decreeing that plaintiffs should have the right to go upon the lands of said defendant in the State of Nevada for the purpose of inspecting the measuring devices installed by defendant in its said ditches, canals and other conduits. (298.)

XI.

"The Court erred in making and entering its decree herein in retaining jurisdiction for the purpose of making rules touching the manner of diverting, measuring and distributing said waters, or for the purpose of making rules concerning the devices to be installed and used for diverting, measuring and distributing said waters, or for the purpose of directing the defendants to keep records of the amounts of water diverted by said Vineyard Land and Stock Company, or for the purpose of requiring defendants, or either of them, to make or file reports concerning the amounts of water diverted, or for the purpose of appointing commissioners or watermasters to make distribution of said waters, or for the purpose of making any order whatever touching the distribution, points of diversion, places of use, or methods of irrigation, in the use of said waters by the defendant Vineyard Land and Stock Company in connection with the irrigation of its lands in the State of Nevada. (298.)

XII.

"In addition to the foregoing, The Utah Construction Company assigns as error, that the Court erred in making and entering the decree herein as to it, and in not dismissing the bill of complaint as to said defendant." (299.)

BRIEF OF THE ARGUMENT.

The Court Erred in Granting Plaintiffs Any Relief as Against the Defendant, The Utah Construction Company, and in Not Dismissing the Bill as to Said Defendant.

Although this point is raised by the twelfth and last assignment of error, it can quite properly be disposed of first. It will be noted by referring to the bill that no allegation was made charging the defendant, The Utah Construction Company, with having constructed any canals or ditches for irrigation purposes, or with having used any of the waters of said streams for such purposes. It is alleged that "said defendant" was the owner of lands in the State of Nevada, but not that any of such lands were irrigated from the waters of Goose Creek. It is alleged that "said defendant" was the owner of nearly all of the capital stock of the defendant, Vineyard Land and Stock Company, and that it directed and controlled the operations of said Vineyard Company. It was admitted in the answer that the defendant, The Utah Construction Company, was the owner of certain lands in the State of Nevada; that it owned nearly all of the capital stock of the Vineyard Company; but it was denied that the operations of the Vineyard Company were directed or controlled by The Utah Construction Company. In the affirmative allegations of the answer it was not alleged that The Utah Construction Company claimed any right whatever in or to the waters of Goose Creek or the tributaries thereof. On the contrary, it was alleged that the defendant, Vineyard Land and Stock Com-

pany, was the owner of all of the irrigated lands in the State of Nevada in any manner involved in the suit and was the sole claimant of the waters used for the irrigation of those lands. The only thing introduced at the trial upon any issue involving The Utah Construction Company in any way consisted of a stipulation (67) between counsel to the effect that The Utah Construction Company was the owner of a large portion of the capital stock of the Vineyard Company and that such ownership constitutes the only relationship that exists between the two companies. No attempt was made by plaintiffs to prove either that the defendant, The Utah Construction Company, had used, or threatened to use, any of said waters, or that it had ever attempted to direct or control the operations of the Vineyard Company.

It would seem, therefore, that a bare statement of the facts is all that is necessary in support of this assignment.

Pittsburgh etc. Co. v. Duncan, 232 Fed. 586.

Appellants' First and Second Assignment of Errors.

These assignments raise the question as to the correctness of the decree with respect to the water rights awarded to plaintiff under grants from private individuals. These are the rights mentioned in paragraph (a) of the decree, as follows:

825 acre feet under date of May 1st, 1878;
275 acre feet under date of May 1st, 1879;
687.5 acre feet under date of May 1st, 1880;
2337.5 acre feet under date of May 1st, 1882;

1375 acre feet under date of May 1st, 1883;
8250 acre feet under date of May 1st, 1884;
4125 acre feet under date of May 1st, 1888.

The assignments with respect to the provisions of the decree granting these rights are as follows:

I.

"The Court erred in decreeing to plaintiffs any of the waters of said Goose Creek and its tributaries, with the exception of such of said waters, to-wit, about 30,000 acre feet thereof, as plaintiffs are entitled to under permits issued by the State Engineer of the State of Idaho, being respectively, permit number 3751, dated March 27, 1908, and permit number 4731, dated March 10, 1909. (295-296.)

II.

"Even if the Court did not err in decreeing to plaintiffs water rights in said streams other than those to which plaintiffs are entitled under said permits No. 3751 and No. 4731, respectively, the Court erred nevertheless in decreeing to plaintiffs water from said streams, other than as follows:

450 acre feet dating from May 1st, 1878;
150 acre feet dating from May 1st, 1879;
300 acre feet dating from May 1st, 1881;
1350 acre feet dating from May 1st, 1883;
6755 acre feet dating from May 1st, 1888; and
21025 acre feet under said permits No. 3751 and No. 4731." (295.)

Plaintiffs claim rights under purchase from former appropriators of waters aggregating three hundred second feet. From the nature of the proof offered by them in support of the allegations of the bill with respect to these rights it will be seen that if they were the owners in fact of any of these early rights they acquired the same under deeds from individual grantors. The necessities of the case were such, therefore, that it was incumbent upon plaintiffs to prove, first, the existence of each of said rights; and, second, a conveyance thereof to plaintiffs. It is submitted that the proof utterly fails to come up to these requirements. We set forth below everything appearing in the record with relation to these so-called early rights.

Plaintiffs' witness, Sol Worthington, testified:

I am a farmer and merchant and have resided at Oakley, Idaho, for thirty years. I am familiar with the negotiations which led up to the construction of the Oakley irrigation project, and particularly the negotiations with settlers owning lands and old water rights under that project. I was chairman of the committee chosen by the people to negotiate the merger. The committee was formed in 1909, prior to the (72) making of the contract with the State for the construction of the works.

Mr. Hays: Please state precisely what that committee did in order to bring about the arrangement.

Mr. Nebeker: We object, if the Court please, as immaterial and irrelevant, and on the further

ground that it appears that the contracts were entered into which consummated these negotiations inquired about here, and those contracts constitute the best evidence.

MR. HAYS: This is just leading up to that arrangement.

THE COURT: I think I will let him state very briefly what was done, and then you can go into details—upon the suggestion that it is preliminary only. It can't be of any substantive value. You may proceed, Mr. Worthington, and state briefly.

MR. WORTHINGTON (continuing):

The committee's labor was to ascertain the amount of land that they had in actual cultivation and the purpose was to acquire an exchange from the reservoir of sufficient water to irrigate the lands that we had already under actual cultivation. We ascertained the area of the patented lands, as well as all lands under cultivation. There were 6,500 acres of cultivated lands and approximately 12,000 acres of patented lands. On Plaintiffs' Exhibit No. 6 the 12,000 acres of patented land is represented by those blocks having diagonals. Plaintiffs' Exhibit No. 5-c is the form of contract entered into with the people who had irrigated lands on the Oakley project. Contracts were issued in the form of 5-c at $40.00 per acre. (73.) The people owning water entered into an agreement to transfer their rights to the Twin Falls Oakley Land and Water Company in the form of Plaintiffs' Exhibit 8. (74.)

Plaintiffs thereupon offered in evidence Plain-

tiffs' Exhibit No. 8, to which offer defendants objected as immaterial and irrelevant, and so far as it purports to show the conveyance of any water rights or agreement to convey any water rights to plaintiffs, on the ground that it is not the best evidence.

MR. NEBEKER: You don't contend that by this contract any water rights was conveyed to the company.

MR. HAYS: We will take that up later, but it was under this form. Of course, this does not convey anything; this is simply a blank form, but it was under these forms that conveyances were made later. We will furnish you a list, as I suppose it was understood, showing these conveyances.

MR NEBEKER: That is correct. Then we will withdraw the latter part of the objection, the part as to its not being the best evidence.

A certain document was thereupon marked: *Plaintiffs' Exhibit No. 8.*

THE COURT: Overruled; it may go in.

MR. WORTHINGTON (continuing):

That agreement was followed by conveyances of the water rights, in the form of Plaintiffs' Exhibit No. 9.

This exhibit was thereupon offered in evidence over the objection of defendants that the same was immaterial and irrelevant. (74.)

A certain document was thereupon marked: *Plaintiffs' Exhibit No. 9.*

MR. WORTHINGTON (continuing):

The people on what may be called the old lands,

indicated on Plaintiffs' Exhibit No. 6 by the diagonal white lines, obtain water at present from the Goose Creek Reservoir under the terms of these forms of contract. (75.)

Plaintiffs' witness, Benjamin Howells (75), testified:

I have resided at Oakley, Idaho, for thirty years. I am a practicing attorney there and ranching some. I have some knowledge of the negotiations relating to the transfer of what might be called the old water rights. Most of those deeds and contracts were made and signed in my office. Prior to that time the waters of Goose Creek were handled by a water master under a decree of the District Court of our county. The decree in the case of Martin Okelbery, H. M. Thatcher, et al., against C. H. Karlson and others, in the District Court of the Third Judicial District of the Territory of Idaho, in and for Cassia County, and dated the 10th day of September, 1886, was the first of these decrees for the waters of Goose Creek. The decree in the case of Mary H. Botzet against George Chapin, and others, in the same Court, dated the 19th day of March, 1892, was the second decree.

Mr. Hays: We offer in evidence certified copies of those decrees. The defendants in this case were not parties to those decrees. (75.)

Q. (By Mr. Hays.) I will ask you one further question, Mr. Howells. Were all or substantially all of the water users from Goose Creek, in what might be called the Oakley district, that is, from the present

site of the dam of the company northward, parties to this suit, the last one?

A. The last suit, I think, most of the water users were parties to the last decree, the last suit.

MR. NEBEKER: Just a moment. I move to strike out the statement of the witness that the parties to this suit were water owners, on the ground that it is giving a conclusion of the witness.

MR. HAYS: Well, water users, then.

THE COURT: You mean by owners the water claimants?

A. Yes, sir; claimants.

MR. HAYS: Q. You also mean the people who actually used the water, Mr. Howells?

A. Yes, so far as I know.

MR. NEBEKER: We move to strike that out, if the Court please, as not the best evidence, and giving the conclusion of the witness.

MR. HAYS: If the Court please, that is not necessarily an opinion.

THE COURT: I think I will let it stand.

MR. NEBEKER: All that I desire, if the Court please, at the present time is that the record will not be bound by the statement of Mr. Howells here as to the establishment of these rights. I don't desire to delay the putting in of this testimony so long as it isn't claimed— (76.)

THE COURT: The only purpose of this testimony, as I understand, is to get the information that most of the persons who claimed or used waters from the stream were parties to this suit.

MR. HAYS: That is true.

THE COURT: Of course, the matter of use is a question of fact. Now, if he knows there were not many other users or claimants, he may so state.

MR. NEBEKER: I think the negative of it may perhaps be competent, but for him to testify that these persons who were parties to this decree were water users might raise the presumption and make a *prima facie* case of ownership, and I don't know whether it is the intention to put it in for that purpose.

THE COURT: It won't go very far, of course, in establishing a right, of course, because he doesn't indicate the amount they used or when they began to use it, or the method of use.

MR. HAYS: Q. Were you generally familiar with conditions there?

A. At the time of these decrees?

Q. Yes.

A. Yes, I was more or less acquainted with the conditions.

MR. HAYS: I now offer in evidence the decrees mentioned.

Said document was thereupon marked: *Plaintiffs' Exhibit No. 10.*

MR. NEBEKER: These are objected to as immaterial and irrelevant, if the Court please, and on the further ground that it is not shown that any of (77) the parties mentioned in the decrees were the owners of any water rights at the time the decree was rendered, and particularly as to being irrelevant and immaterial as to either of these defendants, for the

reason that they were not parties to this action. The objection—

THE COURT: Are there two exhibits, 10 and 11?

MR. HAYS: No, they are bound together under one cover.

MR. NEBEKER: The objection goes to Exhibit 10, including both decrees.

THE COURT: I am not sure that I understand the nature of your objection, Mr. Nebeker. I am inclined to think the decrees are both relevant and material. Whether or not they will be competent against your client is another question. They relate to a very material matter.

MR. NEBEKER: Our objection goes to the point that they would be, I take it, immaterial and irrelevant as to us until it is shown that the parties to that suit, that is, shown as to us that the parties to that suit were the owners of water rights. That is what I had in mind in making the objection. I don't object to the fact that the original decrees are not presented here.

MR. HAYS: Or the pleadings, I presume?

MR. NEBEKER: Or the pleadings. We do object to these exhibits, and each of them, as to their competency as to us in all respects except that we do not object to them on that ground, as being certified copies instead of the original decree, and the (78) pleadings upon which the decrees were taken, if the Court please.

THE COURT: Upon what theory can I receive them upon this objection?

MR. HAYS: If the Court please, they are necessarily a part of our title. We obtained the ownership of these various water rights, and we obtained them through the medium—from the parties or their assigns who were parties to this suit and this decree. We will have to follow it up later with other proof, as I take it.

THE COURT: You mean you simply offer them for the purpose of identifying the descriptions in your deeds?

MR. HAYS: No, we do not do that, if the Court please. We offer this as a part of the history of the transaction through which we obtained our water rights, and as a part of our chain of title. I do not understand that they object to any informality on the part—so far as not having the pleadings here, or the findings, or anything of that sort.

THE COURT: What I am trying to get at is, whether or not you claim the decree is proof of your water right which you now claim as against the defendant company.

MR. HAYS: Possibly it might not be, but we have to show through what source we obtained our rights.

THE COURT: Suppose there had never been any decrees?

MR. HAYS: Then we would have to show the facts from the users of water. (79.)

THE COURT: That is what I am trying to get at. Now, do you contend that with the decrees in you will not have to show the facts.

MR. HAYS: No, I don't claim that. I will still

have to show other facts as well. This decree, of course, wouldn't bind the other parties.

THE COURT: With that admission, the decrees I think may go in. I hardly see how they will serve any useful purpose, however, other than the identification of the description in your deeds, if reference is made to the decrees, as I infer it is from these forms you have offered in evidence.

MR. HAYS: Yes.

THE COURT: But if they are not evidence of the appropriation of water then they are not evidence of any right.

MR. HAYS: If we later prove that they had some right or cultivated some land, then the title may go through, perhaps. If we fail to do so conditions might be different.

MR. NEBEKER: Then do I understand, if the Court please, that they are not offered as substantive proof of the existence of any water rights in the parties to the suits in which those decrees were entered, or any ownership?

MR. HAYS: They are only offered as a part of our chain of title, which we propose to take up, but you were not parties to that suit. Therefore, as we understand it, you would not be bound by that decree.

MR. NEBEKER: And you don't claim that they constitute any evidence of ownership of water in the parties to the decree? (80.)

MR. HAYS: That may or may not be. That may or may not be, as will hereafter appear. It is just simply one person has a deed to a piece of land. I

can't offer only one deed at a time. I have to follow my chain of title down. I don't exactly understand—

THE COURT: I think Mr. Hays has a different conception of the function of the decree from what I had in mind. You seem to regard it as one link in the chain of title. I don't understand how a water decree can be a link in a chain of title. A decree does not confer anything upon the person to whom the decree goes that he didn't already have, presumably. It simply confirms in him a right which he claims already to have.

MR. HAYS: And it may fix, as between him and the other parties to the decree, the amounts.

THE COURT: It would of course as to the other parties, that is true.

MR. HAYS: It is in that, if the Court please, as I understand it, that it may become a chain of title.

THE COURT: I think I will let the exhibit go in, upon the express statement of Mr. Hays that he does not claim that this is binding in any way upon the defendant companies. So far as they are concerned at least, you will have to show the existence of a water right the same as if a decree had never been entered, so I think with that understanding you may proceed, and no one will be misled.

Mr. Howells (continuing):

Plaintiffs' Exhibit No. 11 appears to me to be an itemized list of the parties signing the deeds and (81) the several different inches or dates of water which the people were conveying to the company.

Plaintiffs thereupon introduced in evidence

Plaintiffs' Exhibit No. 11, for the purpose only, as stated by counsel for plaintiffs, as showing a summary of all deeds made by claimants of the waters of Goose Creek to the company, and for the purpose of showing that said deeds conveyed to the company only such waters as were owned by the claimants at the time the deeds were made.

Mr. Howells (continuing): Under the decree there was a conveyance of so much Thatcher water, as they called it, and so much Chapin water and so on, and Plaintiffs' Exhibit No. 11 shows the list of conveyances purporting to be made under the decree. Plaintiffs' Exhibit No. 12 is a map showing the patented lands, or old irrigated lands, in the Goose Creek Valley at the time of the organization of the new project in 1909. I think I can designate on this map the ditches then existing in the Oakley district. The points of diversion and the names were as follows: The point of diversion of the two main canals or laterals is shown in the lower part of Plaintiffs' Exhibit 12; the one running to the right or east is known as the east canal, and the one running to the left or west is known as the west canal. The Hopkins or Haywood ditch is the second ditch on the east side and lower down. It runs through section 8, township 14 south, range 22. The second ditch on the west side of Goose Creek and lower down is the Worthington-Sevier and Cummins ditch, running (82) down through to irrigate a portion of section 8, same township and range. Then the next ditch I notice on the map and having its source east of Goose Creek and

further down, or north, is the Keplinger & Birch ditch, known in the early days there and mentioned in the decree. The next ditch I notice on the map further down on the west side of Goose Creek, and mentioned in the decree, is the Ferguson & McBride ditch. Further on down on the east side is what is known as the Tolman & Whittle ditch mentioned in the decree. Further down on the west side is what is known as the Wells ditch mentioned in the decree. Pretty well below the center of the old lands there is a dam and ditch running from the west side of the creek known as the Tolman ditch mentioned in the decree. Further on down the project and on the west side again is what is known as the Green & Homer ditch mentioned in the decree. I made a mistake as to the Wells ditch. It is further on north, running out of the east channel of Goose Creek after it spreads or forks, down near the center of the old irrigated project, and goes into what we call the island in between the two streams. The last ditch taken out is the Carson-Copper ditch. The early rights, or those which are dated furthest back in the decree mentioned, is on down some eight or ten miles below these last ditches, in township 11, range 22. They are known as the Thatcher ditch, Chapin ditch, Dunn ditch, Botzet ditch, and those names of parties mentioned in the decree. The Tinkrel ditch was further on down. It was taken out of Goose Creek (83) just a short distance above where the present town of Burley is situated.

Q. * * * What, if you know, Mr. Howells, what

was done by the people up in the vicinity of Oakley towards acquiring the rights of those people that were further north?

MR. NEBEKER: That is objected to as calling for a conclusion, and immaterial and irrelevant and incompetent.

MR. HAYS: Mr. Nebeker, that would, of course, involve only a conveyance between our own people, and I presume would not affect your rights.

MR. NEBEKER: If it isn't offered for the purpose of showing that any water rights existed—

MR. HAYS: Not at the present time.

MR. NEBEKER: —in the persons to whom you refer, I have no objection.

MR. HAYS: Not at the present time. My purpose is this, to show that the people up around Oakley purchased from the people further north their rights, and used whatever rights they had up in the vicinity of Oakley, and distributed them among themselves.

MR. NEBEKER: Whatever rights they had?

MR. HAYS: Whatever rights they had.

MR. NEBEKER: If any.

MR. HAYS: Yes. Later on we will show what those right were, possibly.

Mr. Howells (continuing): As I remember, in the spring of 1889 H. C. Haight, now dead, negotiated a deal for the Thatcher water, which was then being (84) used away down the valley at the lower end of the settlement, and brought the water up to Oakley settlement and distributed it, half an inch, or an inch,

or an inch and a half, to the people who lived in the vicinity of Oakley, for the purpose of saving the trees and gardens.

MR. HAYS: This is just part, Mr. Nebeker, of the history of the locality.

MR. NEBEKER: You don't claim that it has any tendency to prove title?

MR. HAYS: Not until later. We hope to claim it later. We hope to make our claim through these rights.

MR. BOYD: In other words, you expect to establish the Thatcher rights later?

MR. HAYS: Yes. I am simply trying to avoid the introduction of a large mass of documentary evidence, and things of that sort.

MR. HAYS: Q. Were any of the other rights further north purchased?

A. Well, not in the vicinity of the Thatcher water.

MR. NEBEKER: If the Court please, I don't want to obstruct the trial of this case in any way; I would like to expedite it. I don't ask that this documentary evidence shall be produced here, but these questions all involve the assumption that there were water rights, and I fear that we will soon have the record charged with testimony of that character in such a way that it will be difficult for us to ascertain if some proof has not been made in this way of the existence of rights. (85.)

THE COURT: Counsel has expressly disclaimed that and of course he will be held to his disclaimer.

MR. NEBEKER: Well, with that understanding, I have no objection.

(Last question read.)

A. Yes, in the vicinity of where the Thatcher water was used. Mr. Howells (continuing): A short time after the Thatcher water was purchased by Mr. Haight, parties made arrangements and bought the Chapin water, a good deal in the same manner, and divided it among the several people up the valley in the vicinity of Oakley, Marion and Island, little settlements shown upon the map. The Tatro claim was purchased and distributed in the same way and the Dunn water and the Botzet water as mentioned in the decree. All of the water mentioned in the decree that was formerly claimed at the lower end of the valley was purchased by different parties and moved up the valley in the vicinity of Oakley and Marion.

MR. HAYS: Mr. Nebeker, as I understand it, our stipulation is to this effect, that we are the successors in interest of whatever rights those people had under that decree?

MR. NEBEKER: That is my understanding; General, yes.

MR. HAYS: So that we may confine our proof to the rights themselves?

MR. NEBEKER: To the rights themselves.

MR. BOYD: In other words, that we are the owners of whatever rights we have on our side, and that (86) you are the owners of whatever rights these people may have had on your side.

Mr. Howells (continuing): I first went to the vicinity where Oakley now is in 1878. I was there in 1880-81 and 88. In 1888 I attempted to distribute the waters as water master of Goose Creek. It was the driest season I have seen in that country. My duties took me over the various ditches. As far as I remember the ditches shown on Plaintiffs' Exhibit No. 12 were in existence at that time. The first decree on Goose Creek was in 1886. In 1888 I distributed the waters on Goose Creek over most all of the country shown in green on Plaintiffs' Exhibit 12. I would approximate the acreage at 6,000 to 6,500 acres; perhaps not all irrigated that year, but as much as could be with the supply of water we had. The supply was very scarce and was not sufficient to cover the entire area. All of the flow of Goose Creek was diverted at the points shown in Plaintiffs' Exhibit 12. I think every ditch was used more or less that season. I believe in 1878 there was 300 acres farmed in the vicinity of Oakley and on north down the valley at what was known as the Thatcher place. In 1879 the acreage was, I think, probably 400 acres. In 1880 it was increased; people were coming into the country and developing it, in small tracts at first and then increasing, and along as the settlement grew older more people came in. The chief influx of population was in 1881 and 1882. Up to the time of the influx of people in 1881, there would probably be six or seven hundred acres in cultivation.

The location and capacity of the ditches were vir-

tually the same in 1909 as in 1888. There was very little change in the area of irrigated land between the two years. The irrigation of the 6,500 acres was about the same between 1888 and 1909 and down to the present time. The waters of Goose Creek and its tributaries were used by these farmers from year to year. In 1888 and subsequent years many of the ditches were able to carry much more water than we had for them. The conveyance to the Twin Falls Oakley Land and Water Company purported to convey 8,890 some odd inches, as I remember it. That is substantially what the totals would be from that blue print. There was about 6500 acres effectively cultivated. I cannot say what the difference between 6,500 and 8,890 inches represented, other than perhaps the 8,890 odd inches of decreed water indicated that the parties making the deal thought some of the water was of little value by reason of it being only flood water or high water. Prior to the construction of the reservoir system the people began irrigation as soon as possible in order to get their hay lands, alfalfa lands, and so on, irrigated up as early as possible in the spring. (88.)

The decrees referred to in the foregoing proceedings were introduced in evidence as Plaintiffs' Exhibit No. 10. (259-275.)

It is not claimed that either of the defendants was a party to the suits in which these decrees were rendered and, therefore, the decrees do not constitute evidence of title in this suit. Plaintiffs did not attempt to establish title in a single one of the alleged

grantors. There is in the record a list of names of individuals who, ostensibly, had conveyed water rights to the plaintiffs, but there is not a scintilla of evidence tending to prove that either of said grantors at the time the respective conveyances were executed, or for that matter, at any other time, had any title to convey. It seems to have been conceived by plaintiffs that the existence of water rights in the individuals who made deeds to them was established by the decrees offered and received over the objection of the defendants, although the Court ruled upon the matter on several different occasions and made it entirely clear that the decree should not be regarded as substantive proof of the water rights mentioned therein. It was obviously incumbent upon plaintiff to prove all the facts necessary to establish that each and every grantor was the owner at the time of conveyance of the right mentioned in the deed. It did not suffice for them to show that at some indeterminate time in the past certain unnamed and unidentified persons had diverted and used from the waters of Goose Creek a sufficient quantity of water for the irrigation of a tract of 6,500 acres as claimed by plaintiffs. Who were these individuals? Were they the same persons whose names appear in the decrees or in the deeds to plaintiffs? We submit that it was not shown that a single individual named in the list of plaintiffs' grantors ever had any water rights to convey.

If it be true that plaintiffs failed to show title as to the so-called old rights then it must follow that they are foreclosed from claiming any part of this

300 second feet of the waters of Goose Creek under their alleged appropriation; for, if this water had been appropriated as by formal allegation in their bill they say it was, it was not public water and therefore not subject to appropriation at the time they filed their application with the state engineer of Idaho.

It will be noted that the question as to the so-called early rights is stated in the alternative. We will briefly explain our position with reference to the point raised in the second or alternative assignment of error.

Assuming that the Court did not err in the particulars we have just been discussing, it did err, we think, as to the quantities of water granted under the so-called old rights, and also erred with respect to the dates thereof. First, let us see what the evidence is concerning the dates when it is supposed that these water rights were acquired. There is sufficient testimony to support the findings that there were three hundred acres under cultivation in 1878; that there was an additional one hundred acres under cultivation in 1879; also an additional two hundred acres in 1881 (87); possibly an additional nine hundred acres in 1882 or 1883 (89); and approximately an additional 5,000 acres in 1888. (87.) However, we find no evidence in the record justifying the finding that there was any appropriation in the year 1880, or in both the years of 1882 and 1883, or in the year 1884. The two witnesses for the plaintiffs who testified with respect to this early irrigation, were Mr. Benjamin

Howells (75), and C. J. Parkinson. (88.) Mr. Howells testified (87), that he entered the vicinity of Oakley in 1878; that in 1888 he distributed the waters of Goose Creek for the irrigation of approximately 6,000 to 6,500 acres, although it was not all irrigated in that year on account of the scarcity of the supply. That in 1878 there was 300 acres; that in 1879 there was probably 400 acres; that it was increased in 1880 but did not say how much; that the people were coming into the country and developing it in small tracts; that the first influx of population was in 1881 or 1882; that "up to the time of the influx of people in 1881 there would probably be six or seven hundred acres in cultivation." That the irrigation of the 6,500 acres was about the same in 1888 as at the present time. (88.)

The witness Parkinson testified that he went to Oakley in 1882; that in 1882 and 1883 he would judge there was possibly 1500 to 2000 acres under cultivation; that there was not much difference in the ditches and old claims between 1882 and 1883 up to 1900.

Under the most favorable construction that could be placed upon the testimony, the appropriations occurred respectively in 1878, 1879, 1881, 1882 or 1883, and 1888, and the areas irrigated in those years would be as above stated by the plaintiffs' witnesses, instead of the areas found by the Court and stated in the decision. (278-9.) This brings us to a consideration of the duty of water for these lands.

The Court says in its written decision (283): "Upon consideration of the entire record I have con-

cluded to allow the plaintiff at the rate of 2¾ acre feet per acre." This duty applied to the acreage found by the Court gives the quantities awarded to plaintiffs under these so-called old rights, as stated in paragraph (a) of the decree. (285.) But there was no evidence offered from which the Court could properly conclude that a duty of water of 2¾ acre feet per acre would reasonably be required for the irrigation of these lands. On the contrary, plaintiffs only claimed a duty of one and one-half acre feet per acre. The State contract required plaintiff to furnish settlers only that quantity, and it was formally stipulated (88) "that the Oakley lands were originally arid in character and that they require one and one-half acre feet as provided for in the State and Settlers' contracts for their proper irrigation." Applying a duty of one and one-half acre feet to the acreages shown by the evidence, it will be noted that the plaintiffs' rights under prior grants should not exceed those stated above in the second assignment of error.

The Court Erred With Respect to the Quantities of Water Awarded to Defendant, Vineyard Land and Stock Company, and with Respect to the Dates to which Said Rights Relate.

The fourth assignment of error is as follows:

"The Court erred in making and entering said decree, in not holding that the defendant, Vineyard Land and Stock Company, had the following rights to the use of the waters of said streams:

400.0 acre feet, dating from the year 1875;
1018.4 acre feet, dating from May 1st, 1883;
962.0 acre feet, dating from May 1st, 1886;
15.6 acre feet, dating from May 1st, 1888;
393.6 acre feet, dating from May 1st, 1889; and
1418.4 acre feet, dating from various dates between the year 1890 and January 1st, 1906."

The decree awards to the defendants rights aggregating 1935 acre feet per annum. It will be seen at once that these rights are of relatively little consequence. Eight hundred thirty-five acre feet of the water involved in these rights is made subsequent and inferior to rights awarded to plaintiffs, aggregating 17,875 acre feet. Even if all of the rights granted to the defendants were prior to the rights granted to plaintiffs, thus insuring a supply of water to satisfy the defendant's rights, there would still be only a sufficient quantity of water to irrigate properly about 500 acres of the defendant's lands according to the customary mode of irrigation in that section of the country. There is only about one-third as much water as would be reasonably required for the irrigation of those lands of the defendant that, according to the Court's finding, were irrigated long before either of the plaintiff companies was organized. The Court found (280) that defendants had acquired water rights for the acreages and under the dates following:

On the Winecup Ranch, 100 acres of pasture or meadow land from May 1st, 1875; 125 acres of

meadow or pasture land from May 1st, 1886; 100 acres of meadow or pasture land from May 1st, 1900.

On the Grande Ranch, 250 acres of pasture or meadow land from May 1st, 1883; 50 acres of hay land, May 1st, 1883; 50 acres of hay land, May 1st, 1889; 100 acres of pasture land, May 1st, 1900.

Spring Creek Ranch, 10 acres of alfalfa, 35 acres of wild hay land; and 75 acres of pasture land, as of May 1st, 1904.

This total of 895 acres is to be irrigated with 1935 acre feet of water; this is about two and one-eighth acre feet per acre. But only a part of this 1935 acre feet is awarded to defendant as a primary right. For that reason there is no assurance that this quantity of water will always be available for irrigation.

The 895 acres of land which the Court found was irrigated by the defendants prior to the date of filing plaintiffs' first application does not quite include all the lands that were shown to have been under irrigation prior to that date. In the testimony of Mr. Way (125) it appears, by taking the acreages given by him, that there were 1052 acres under the old irrigation. It will also be noted from Mr. Way's testimony, when considered in connection with defendants' Exhibits No. 3 and No. 4, that since the year 1908 the Vineyard Company has taken out canals and ditches and has brought under cultivation several thousands of acres of land along Goose Creek and its tributaries. The Court disallowed defendants' claims on account of this development and it

may be conceded that the only basis upon which such claims can rest is that the defendant, Vineyard Company, is entitled to avail itself of the principle of a just and equitable division of the waters of Goose Creek as between the appropriators in Nevada on the one hand and the appropriators in Idaho on the other.

Kansas v. Colorado, 206 U. S. 117.

But passing that question for the time being and returning to the subject of the rights of the Vineyard Company that were recognized by the Court in its decree, it is submitted that the Court erred with respect to certain of the dates of those rights and more particularly with respect to the duty of water as applied to the irrigation of the lands of the Vineyard Company.

For the year 1886 the Court awarded a right for 125 acres on the Winecup Ranch, but did not award any additional acreage for the Rancho Grande. In that year, according to undisputed evidence, a ditch was constructed that brought under irrigation all of that part of Section 35 on the Grande Ranch lying on the east side of the channel (102) with the exception of the small area that had been irrigated from the dams placed in the natural channel. This ditch was six feet wide and a foot deep. Its location is shown on defendant's Exhibit No. 1, the original of which has been transmitted to the clerk of this Court. From this exhibit and from the tabulation of acreages made by Mr. McClellan (276) it appears that in 1889 there were 438.4 acres under irrigation at

Rancho Grande. The Court found that in 1883 there were 300 acres under irrigation on that ranch. Therefore there must have been an increase of approximately 128 acres between 1883 and 1886. This increase should be added to the 125 acres which the Court found was brought under irrigation at the Winecup Ranch in 1886, making a total of 253 acres of additional irrigation for that year. Assuming that the Court's finding of 50 acres of increased irrigation for 1889 is correct, we have the following:

100 acres from 1875;
An additional 300 acres from 1883;
An additional 253 acres from 1886;
An additional 50 acres from 1889;
An additional 192 acres between 1889 and 1904.

Total, 895 acres.

To complete the statement at this point we will anticipate the argument which follows by assuming a duty of 4 acre feet per acre which, when applied to the acreages above stated, gives results as follows:

400 acre feet as of May 1st, 1875:
1200 acre feet as of May 1st, 1883;
1012 acre feet as of May 1st, 1886;
200 acre feet as of May 1st, 1889;
768 acre feet dating between 1889 and 1904.

According to the witness Way there was an additional 157 acres under the old irrigation. If we assume that this acreage should be added to the latest right there would be a total of 1396 acre feet between 1889 and 1904.

This brings us to the consideration of the question as to what is the duty of water for these lands of the Vineyard Company. Considerable of the evidence in the record was directed to this point. It was conclusively shown by irrigators that it was the general practice in that section of the country to irrigate such lands by the flooding system. As there was no evidence to the contrary we will quote only sufficient of the record to illustrate the character of the testimony that was introduced on this subject.

Mr. Walter Gamble had been acquainted with these properties since the year 1875. He testified (138) that as early as 1873 he went on to the Rancho Grande and that the land on both sides of the channel was irrigated either by dams placed in the channel or by ditches that were taken out for the purpose of irrigating the higher lands:

> "That there were dams put in Willow Creek in 1889. Water was taken out and put into this slough and taken down and a dam put in and a ditch taken out that ran down into two lower fields. I refer to the field at the house. The upper field was the one above the house. There is a field between these two fields where the house is. It is a grass pasture and was irrigated as soon as I could put the water on in the spring. (139.)
>
> I did irrigating in all the fields. In the spring of 1905 Mr. Workman had been there that winter and he quit and when the water came down I had to go up and tear the boards off

the dam to let the water out and from then on I irrigated all the fields. I would go up and put the water into the main ditch and turn it out wherever I wanted it and scattered it all over the land. I irrigated both the east and the west side. I began along in April and stayed there for 20 days and kept the water over the fields during that time. It was necessary to keep the water over the fields in order to get a crop. Prior to that time water was put out each spring, just as soon as the weather would permit in the same way that I have described. It was kept there until time to cut the hay. I used all the water in the ditches for that purpose. It was necessary to use the water that came through the ditches in order to grow crops of hay. (140.)

Irrigating was done on Rancho Grande fields in the fall of the year to make the grass grow for pasture. Mr. Armstrong had some five to eight thousand head of cattle. Irrigation was carried on on Rancho Grande until it froze up. It was irrigated every fall just as soon as the hay was taken off during the time I was there. (142.)

It was irrigated as early as we could put the water on in the spring continuously from 1886. There was about 100 acres irrigated when I went there in 1875. It was increased from time to time. After 1886 the Winecup field was irrigated for pasture the same as in 1875.

It was increased several acres after 1886. I did ditching on Spring Creek in 1904 to irrigate the alfalfa and pasture land, put in a ditch about two feet wide and two feet deep. The irrigation of the pasture land was to raise grass. I flooded the land and kept it there during the irrigation season. The irrigation season for summer crops on Rancho Grande and Spring Creek is from the first of March until into August. It depends on the season largely. If it is a warm, early spring, we usually put the water out in March if possible. If it is a late spring the water is held off a little later." (143.)

Mr. C. J. Franklin, an irrigation engineer who made a study of conditions on these ranches, testified: (174.)

"The method of irrigation employed on both Rancho Grande and Winecup as I observed them when I was there is the broad or flooding method of irrigation. The waste water ran into other ditches or sloughs and was carried by them and re-diverted and found its way into other ditches or sloughs. The custom was to put a dam in a slough and take out a diversion which was spread over the land and lower down, sometimes as low as 300 feet or so, put in another dam and take out another diversion where the stream would have assumed virtually its normal size at two or three or four hundred feet below the dam and then take out

another diversion, and so on. One particular slough that I examined had seven dams in about one-half a mile. These dams appear to be old structures. It was hard for me to say; and were built mostly of manure and brush and were evidently quite old. From my inspection of this slough and general inspection of the country I would be satisfied that all water not lost in natural losses was returned to the stream. (174-5.)

There is a space at Rancho Grande that I noticed that was about a quarter of a mile from the stream, but there was one canal in that distance, the canal being about 700 feet from the stream as I remember it. I have been designing irrigation works and supervising their construction. I have written a great many reports on irrigation works of one kind or another and have been over a great deal of portions of Southern Idaho and some of Oregon, and inspected these things from the point of desiring to be acquainted with the systems and methods employed in the application of water. That was necessary in connection with my work as an irrigation engineer. From the observations I made of the lands and the method of irrigation employed on those ranches, it is my opinion that no other method of irrigation could be employed than that which is employed there. (175-6.)

The old fields that I saw there are not in all instances bordered by a little bench just above the ditches. They have a slope from the ditches to the river on one side and on the Rancho Grande between the river and the canal on the west side there is a level space. I took a transverse section there; and then it sloped from that canal up to the limit of the irrigated area in a very general slope; no benches. On the outside of the ditches on the Grande Ranch the land rises a little bit. It is in a valley and there are hills on both sides.

The lands lying outside the ditches are foot hills with more or less precipitous slopes. (177.)

By saying that no other method of irrigation on this land could be adopted I meant under existing conditions, the natural unlevel state. I meant that they would have to be flooded and that the land is somewhat irregular and in its natural state would require the flooding system to cover it all. I don't see that any other system could be applied and get the water over the whole thing. What I meant to convey was that the water would need to be spread over the surface under existing conditions." (178.)

The witness, Lowell T. Rasmussen, (197) testified that he had had experience as an irrigator in New Mexico, Colorado, and on the ranches of the Vineyard Company in Nevada. He says:

"I turned the water out on the Rancho Grande

and the Winecup fields in the latter part of March of this year. In parts of the meadows the water was taken off at periods and at other places it was run continuously. I observed the effect upon the vegetation there when the water was taken away from the land for different periods. According to my observation the water could be taken from the land after it had been irrigated about four days before the hay would suffer. At the expiration of that time the ground would commence to dry and the grass begin to wither. I made observations for the purpose of determining whether the crop was as good on lands where the irrigation was continuous as it was on lands where the water was applied every four days. Where the water was flooded continuously there was a good deal the best crop of timothy hay. During the year 1915 there was a part of the land that was not watered as often as every four days. The longest interval that I know of any part of the land not being irrigated was about six days. On the land that was not irrigated for intervals of six days the crop was stunted. The soil appears to be very porous there. It is loam with gravel underneath. The first irrigation required about three times as much water as the subsequent irrigations. The snow was off the ground when I commenced irrigation in the latter part of March. The method of irrigation was by flooding the land. It was

not possible to use any other method on those lands." (198-9.)

By an experiment performed before the conclusion of the trial, it was demonstrated that 1.8 acre feet of water per acre was consumed in a single irrigation on the Grande meadow. (200.) It is true that at the time of this experiment the land was very dry and the stream available for use was not as large as could have been used to good advantage. But the experiment is instructive, nevertheless. It showed at least that the soil on these ranches is of a highly porous character and requires a relatively large amount of water to produce the desired degree of saturation.

The plaintiffs' expert witness, Mr. C. J. Griffith, on cross-examination as to the duty of water on lands such as those at Rancho Grande, testified as follows: (168) "Assuming that it was necessary to continuously run the water over the land in order to produce the best crop, the amount of water turned out at the head would be about *five miners' inches per acre continuously.* That would be required to keep the water running over the land at all times. I have never made any experiments to determine whether it is necessary to keep water flowing over such crops as are produced on the Winecup fields in order to get the best results. (168.) I know that it would take about 40 acre inches per acre for the irrigation of Rancho Grande lands, assuming that the water was turned over and overflowed practically all of the land, *say ten times during the irrigation season.* If

the water was running continuously over it you would have to have a diversion in the neighborhood of five miners' inches per acre running on and off."

The testimony of the witness, Caleb Tanner, (208) is especially noteworthy in this connection. He is a graduate civil engineer of Harvard University and since his graduation has devoted practically all his time to irrigation engineering. He had been connected with the United States Geological Survey and with the United States Reclamation Service; had been State Engineer of the State of Utah for eight years. Since retiring from that position he had been connected with two large irrigation companies in an advisory capacity, and had been detailed particularly to furnish and collect evidence with reference to the duty of water. He was conversant with the literature of the subject and ever since his graduation had been engaged in one capacity or another in connection with the use of water for irrigation. His observation had extended to the irrigation of grains, forage crops, fruits and practically all kinds of crops grown in the great basin. He had been called upon to determine the quantity of water that was necessary to produce hay crops, such as alfalfa, timothy and natural meadow. He had carried on investigations concerning these crops at altitudes quite similar to the place where the defendants' lands are located. In brief, Mr. Tanner showed every qualification for giving a sound opinion concerning the duty of water. His mental bias, if he had any, was in the direction of a more economical use of water, because his activities

had for the most part been for the purpose of aiding water users to employ economical methods. He testified that he had made a study of the conditions at the defendants' ranches in Nevada, and with reference to the best methods of irrigation of those lands, he said: (211) "The soil is sandy loam for the average depth of three feet; the subsoil is gravel. I do not know to what depth it extends. I made observations as to the location of the ditches on those properties and the lay of the land, the irregularities, if such existed, in the surface, and conditions that would affect irrigation there. My purpose was to form some basis so far as I was able in that interval for a judgment as to the requirements of that land to grow the kind of crops that were on the ground. I had sufficient time to look over the superficial conditions, the general soil conditions and the character of the crop that was grown there. I looked at the ditches and their location with reference to the surface of the land to determine whether or not they were reasonably well adapted to the irrigation of those lands economically. They were adapted to the irrigation of those lands. I would say that so long as the lands are used for the growing of forage crops such as exist there that no other system of irrigation or ditch construction could be adopted by which an appreciably greater economy in the use of water could be brought about on the east side. On the west side of the upper field, particularly in the upper end of the field, considerable improvement might be made there at rather a

high expense. There are some rather strong irregularities that make the use of water less advantageous than it would be as it exists at the present time. I mean by plowing it up and leveling down the lands and re-seeding it. That is the only way it could be done. (211-12.) I should say that irrigation could be ordinarily advantageously applied at least until the first of September and might in many seasons continue for some period after that. I think I have a fair judgment from my observations there at Rancho Grande and from my investigations of other tracts of similar character in different parts of the country and from my knowledge in general as to about what the duty of water is, for the irrigation of those lands. In my judgment it would be *4 acre feet per acre.* The duty of water when it is spoken of in acre feet ordinarily is the application of the water to the surface of the land; when you speak of it in second feet you mean the diversion from the natural stream. In ascertaining the number of second feet that should be applied to land it is necessary to take into consideration the necessary losses in getting the water onto the land; also some loss running off the land at the ends, and things of that kind. *In estimating 4 acre feet I do not take into consideration any of those losses.* It is water actually applied to the land." (214-215.) ..... "For such land as would produce a good crop of wheat in the vicinity of Grande and Winecup Ranches it would require about 3 acre feet. *I think it would take 25 per cent. less for wheat than it would for the other crops that are growing there.*

It would require about the same for oats as for wheat." (218.)

There was no evidence introduced in conflict with the testimony of these witnesses, unless possibly it may be contended that a conflict was raised by the testimony given by certain witnesses who testified on behalf of plaintiffs at a later hearing concerning the use of water on other lands.

We think, however, that the testimony of these witnesses does not conflict, but rather that it harmonizes with the testimony introduced by the defendants. Of course the conditions at the places mentioned by the witnesses were not similar to the conditions that prevail on the lands of the Vineyard Company, and their observations, it is true, were plainly of a casual and haphazard character. But taking their testimony for what it is worth, it appears therefrom that it is necessary to keep the ground wet continuously in order to produce wild hay crops.

These witnesses for the plaintiffs and their testimony are as follows:

W. M. Worthington testified (222) with reference to irrigation on the Horseshoe Ranch and the Jews Harp Ranch. He said:

> "The water is thrown out by the floods and beaver dams and things that might be in the creek and then we generally try to irrigate it once or twice after that. We would irrigate about the first of July, the last time. The time when the floods ordinarily go off so as to leave the land dry varies with years. (222-23.) . . .

There are beaver dams in the natural stream through this land. In places it holds the water back. The land receives sub-irrigation as a result of these obstructions. It subs across a 40-acre piece. I don't think the lower part of the meadow land received sub-irrigation as a result of those obstructions in the stream. It doesn't become necessary every year to take out the obstructions in the stream, to harvest the crop. In the lower part we don't harvest it on the Jews Harp. There is a 40-acre strip in that. We don't harvest it because there is too much water. (224). . . . . I never did any boring for the purpose of ascertaining how high the ground water was at different seasons of the year. On the Horseshoe Ranch I think they mow about 400 acres as near as I could guess at the present time. It has been three or four years since I had anything to do with the irrigation of that land. There is no natural overflow in that field. All of the water used for irrigation is taken out through ditches. There might be a very little sub-irrigation on the bottom there. The elevation of the ground water in that field, I imagine, would be about the same as the Jews Harp; I do not know, but that is my judgment. I observed that when we had our floods and they continued for a long time and deposited a wash-out on the meadows, and the water stood there, we didn't have near as good a crop as we did when it flooded over

and would go off and give it a chance to grow." (224-25.)

Walter T. Holt (225) testified that he owned a mountain ranch in Box Elder County, Utah; that

"on my ranch I had wild meadow—a mixture of hays and grasses. I had wire grass, blue grass, and what I called wild red-top. I cultivated this ranch and raised hay there for about 20 years, between 1884 and 1906, along in there. I got off a ton or a little better to the acre. I irrigated twice each season. I would commence sometimes the latter part of May and sometimes along about the 8th or 10th of June. The last time I would irrigate would be along about the last of June or up until the 10th of July. I would cut my crop along about the last of July or the first of August. I did not find it necessary to irrigate every four or five days. I had 160 acres in the wild meadow. I would use a head of water, along about 150 inches, to irrigate with. It would require me, with that head, about 14 days, to irrigate the 160 acres. (226.) . . . . . Usually this meadow land is quite moist up to July, with the spring rains and the overflow of the land. There were some high places. On the high places the grass didn't die particularly; I would start in to irrigate and start the water on the high places and the low places would take care of themselves. The irrigation that I gave in those two seasons of the year

would keep the land moist until the hay was harvested. Some seasons it would be a little different of course. . . . . Two irrigations would keep the land sufficiently moist to preserve the hay and cause it to continuously grow until the harvest time. The land would be pretty good and moist most of the time; not up to the surface, but it would make a good crop. I can generally tell by the hay whether it is drying out or whether it is thriving. It should have continuous moisture to cause the hay to grow. *Hay of that character will cease growing the moment all of the moisture gets out of the soil.*" (227.)

John C. Boren, (227) a resident of Oakley, Cassia County, Idaho, said:

"On this ranch of mine I raise about a ton to the acre on natural wild meadow. I irrigated from once to twice, depending upon the overflow of the creek. I cut the hay along the latter part of July or the first of August. To irrigate the 75 acres I took a head of water of 75 to 100 inches. I would leave that on the ground fourteen or fifteen days, maybe, at a time, running it over there. (228.) . . . . . The creek ran practically down through it. It extended only for a short distance on either side. It received its water from Trapper Creek on one side and from Goose Creek on the other. Take it most any ordinary year, most of the land overflowed more or less; it would over-

flow that low land. I never had a failure of crop there. Under my method of irrigation, I kept the ground moist until harvesting. It seemed to hold the water pretty good. The ground was kept moist up to harvesting time." (228-29.)

S. P. Worthington, (229) another resident of Oakley, said that he was somewhat familiar with the irrigation at the Horseshoe Ranch and the Jews Harp Ranch. He testified:

"The frequency of irrigation upon these ranches depends largely upon the character of the year. When we have a very wet season, and the creek overflows the grass early in the spring, and then recedes, why we have raised a splendid good crop of hay with one irrigation afterwards. (229.) ..... I rather think that the form employed in irrigating the Jews Harp and Horseshoe Ranches would be to keep the ground moist so that the hay would grow." (230.)

Certainly there is nothing in the testimony of these witnesses that has any tendency to contradict the testimony introduced by defendants with reference to the duty of water. The most that can be claimed for it is that two irrigations of 14 days each suffice to produce some kind of a crop, if the overflow and sub-irrigation is sufficient in the early part of the year. The witnesses all agree that it is necessary to keep the ground moist from the time when

the hay starts to grow in the spring until it is harvested in the late summer. This, of course, is all that is necessary for the production of hay and pasturage on the lands of the Vineyard Company. On these lands, however, it is necessary to keep the water flowing over the surface in order to produce the continued condition of moisture that, in the case of the other ranches just referred to, was brought about, in part, by natural overflow and sub-irrigation.

The Court found (283) that a reasonable duty of water for the defendant would be "at the rate of three acre feet per acre for its hay and grain lands and two acre feet for its grass and pasture lands." We do not know of a suggestion anywhere in the record that any less water would be required for the defendant's pasture lands than for its so-called hay and grain lands; in fact the evidence is quite to the contrary. Mr. Tanner said that grain lands would require about 3 acre feet per acre, and that this would be about 25 per cent less than would be required for the kind of crops that were grown on the defendant's properties. If there is any testimony in the record justifying the allowance of a smaller quantity of water for the irrigation of pasture and meadow lands than for the irrigation of grain crops we will be obliged if counsel for appellees will call our attention to the same in their reply to this brief.

In determining the question now under consideration some attention should be paid to the conditions under which the operations of defendant are carried

on. These properties are located in the wilds of Nevada at a great distance from the market and of value only for the production of forage for cattle and horses.

The crops produced there are mainly of a character that requires a relatively large amount of water for their growth. It seems to have been the conception of the trial Court that the methods of irrigation on these properties should be reformed; that the practice of growing wild hay for pasturage purposes should be abandoned and other forms of agriculture substituted therefor. Possibly this is a matter upon which opinions might differ but it surely is one that rests within the discretion of the owner of the property.

The Court erred in decreeing absolutely to the plaintiffs any of the waters of Goose Creek and its tributaries, in excess of the quantity, to-wit, about 30,000 acre feet which has been used by plaintiffs for beneficial purposes.

This point is raised by the seventh assignment of error, which is as follows:

> "The Court erred in decreeing absolutely to the plaintiffs any of the waters of Goose Creek and its tributaries in excess of the quantity, to-wit, about 30,000 acre feet, which has been used by plaintiffs for beneficial purposes, and in enjoining the defendant, Vineyard Land and Stock Company, from using any of such excess waters prior to the actual application ot the same by plaintiffs to the beneficial uses for which said waters are claimed; and in

making and entering any decree herein with respect to such excess waters, except to determine the amount thereof that can be diverted through plaintiffs' works, and the priority of the same, and to set a time within which such amount of such excess shall, subject to the rights of the defendant, be applied by plaintiffs to the purposes for which the same is claimed."

It will be remembered that in 1915, when this cause was tried, there was under irrigation under plaintiffs' project, approximately 20,000 acres of land. (72.) The duty of water on these lands, as we have seen, is one and one-half acre feet per acre, which would amount to 30,000 acre feet in all. The Court was far more generous than Nature has been. By the decree it awarded to plaintiffs a vastly larger quantity of water than there is flowing in the stream. The Court also found that the plaintiffs were entitled to irrigate a very much larger area of land than even they themselves claimed. In addition to the so-called "old rights," the Court awarded them 1100 second feet, under their later appropriations. Eleven hundred second feet flowing continuously for an irrigation season of four months would amount to 264,000 acre feet. Thus the decree seems to be based on the theory that the plaintiffs were entitled to a decree fixing their vested, as well as their inchoate rights, under their permits, and enjoining the defendants from interfering in the future with such rights.

There have been instances, it will be conceded, in which decrees have been entered, granting injunctions against future violations of rights, in the absence of any present infringement or damage. These cases, however, are all confined to the protection of rights that have already vested, although they may be not at the time infringed. For instance, a riparian owner, whose title does not depend upon beneficial use, may be entitled to a declaratory decree protecting his present rights as against any future invasion, but the rights of the riparian owner under such circumstances are present rights, not rights to be earned *in futuro*. The same doctrine is applied in cases of the diversion of underground waters, where, as in Burr v. Maclay, 98 Pac. 260, it is said:

> "If the adjoining overlying owner does not use the water, the appropriator may take all the regular supply to distant land until such landowner is prepared to use it and begins to do so."

This is upon the principle that the owner of underground water, by virtue of the ownership of the lands in which it is found, has the present right to its use, but he should not be allowed to enjoin its use by another who draws it out or intercepts it or to whom it may go by percolation, although perhaps he may have a right to a decree settling his right to use it when necessary on his land if a proper case is made. But in both of the instances discussed above, that is, the right of a riparian owner and the right of an owner of land to its underground waters, there

were involved present actual rights, not prospects contingent upon future acts.

The decree is manifestly erroneous as to all water awarded to plaintiffs, with the exception of the 30,000 acre feet which up to the time of the trial had been applied to beneficial uses. Chapter 35, Laws of Idaho for the year 1913, amending section 4621 of the revised statutes, provides:

> "In allotting the waters of any stream by the District Court according to the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied, and when such water is used for irrigation, the right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land which is irrigated by such water, and such right will pass with the conveyance of such land, and such decree shall describe the land to which such water shall become so appurtenant. The amount of water so alloted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed; provided, that in the case of works capable of diverting more water than is applied to a beneficial purpose at the time the rights of the person or persons owning or using such works are adjudicated by the Court, the right only to the water beneficially applied at the time of making such allotment shall be confirmed by the Court, and the Court shall

ascertain the amount of water which can be diverted through such works in excess of such quantity beneficially applied, and shall set a time when such amount shall be applied to the beneficial purpose for which it is intended, which time shall not exceed six years from the date of the decree issued by such Court under such adjudication, and any person using any of such water which was not beneficially applied at the time of such adjudication shall, before the expiration of the time set for such beneficial application, make proof of such beneficial use in the manner provided in Section 3260 of the Civil Code, and such right, when confirmed in the manner provided in this Chapter and Chapter 2 of Title 9 of the Civil Code shall relate to the priority established by such Court, and if such application of any of such water shall be made subsequent to such date, then the priority of the right to the use thereof shall be determined in the manner provided in Section 3261 of the Civil Code."

The Supreme Court of Idaho, in Sugar Company v. Goodrich, 147 Pac., at page 1076, say:

"The state is the sovereign owner of the right to appropriate and use all of the stream waters which are within the jurisdiction of the state. The state, by enactment of appropriate laws, permits private persons to use its right to appropriate and use the flow of stream water. A

water right claim is not a water right. A water right claim is a declaration of intention, made in a written form prescribed by statute, to give public notice of intention to create water rights identical with descriptions stated in the writing, commonly referred to as a water right. Although they are not, water right claims have become commonly regarded as being the same thing as water rights. One is a mere declaration of intention to create a water right which may never be anything more than an intention. By a compliance with conditions of the permit, the water right claim then becomes a water right. The statute may permit an appropriator to change any or all of the conditions contained in the declaration of intention, except the particular stream from which the diversion is intended to be made, but it could not be successfully maintained that a subsequent appropriator's right to the use of the waters of a stream should be impaired by change in the declaration of intention to appropriate by the act of the party, or with the consent of the state engineer, or to change the point of diversion. The extent of the permit of the state is measured by the use of the water under the conditions and limitations of the permit. A failure to put the water to a beneficial use, or to comply with the conditions of the permit, is an abandonment of the use, and this would be true whether or not there was a statute containing such a provision."

Numerous authorities might be cited in which the principle now under discussion has been applied. The following brief quotations will serve to illustrate the manner in which the principle is applied to water cases.

In Miles v. Butte Electric & Power Co., 79 Pac. 549, it was said:

> "Until a claimant is himself in a position to use the water of a stream subject to appropriation, the right to the water or water right does not exist in such sense that the mere diversion of the water by another is a ground of action either to recover the water or for damages for the diversion."

In Green Valley Ditch Co. v. Frantz (Colo.), 129 Pac. 1006, the court say:

> "A decree for plaintiffs in an action to quiet title to an irrigation ditch and its appropriation therefrom should be limited to the amount theretofore actually carried through the ditch and applied to a beneficial use, making the necessary allowance for seepage and evaporation."

In Bowen v. Spaulding (Or.), 128 Pac. 37, the court say:

> "The drastic remedy of injunction will not be granted to protect water rights unless not only the appropriation by notice but also the actual application of the water to the intended use and the necessity of the use for the purpose in question be clearly shown."

The Court erred with respect to those provisions of the decree intended to operate upon property and rights and to regulate the internal affairs of appellant in a foreign state.

Under this general heading may be grouped for discussion the Sixth, Eighth, Ninth, Tenth and Eleventh assignments of error, which are as follows:

VI.

"The Court erred in limiting and restricting the defendant, Vineyard Land and Stock Company, with reference to the sizes of irrigation streams to be used by it in the irrigation of its lands in the State of Nevada from the waters of said Goose Creek and its tributaries. (296.)

VIII.

"The Court erred in making and entering its decree herein enjoining the defendant, Vineyard Land and Stock Company, from changing the points of diversion and places of use of the waters of said Goose Creek and its tributaries, in the State of Nevada, as authorized by the laws of said state. (297.)

IX.

"The Court erred in making and entering its decree herein enjoining the defendant, Vineyard Land and Stock Company, from irrigating its lands in the State of Nevada by means of dams placed in the natural channels of said Goose Creek and its tributaries, and in sloughs and other channels leading therefrom,

thereby flooding said lands without the use of artificial canals, ditches and conduits, and in enjoining the defendant, Vineyard Land and Stock Company, from diverting any of the waters of said stream or its tributaries, except by means of ditches or other devices provided with automatic measuring guages. (297.)

X.

"The Court erred in making and entering its decree herein, requiring the defendant, Vineyard Land and Stock Company, to install in all of its ditches, canals and conduits, in the State of Nevada, automatic measuring devices for measuring all waters used by the said defendant from said streams, in said state, and in decreeing that all such measuring devices and guages shall at all times be subject to the inspection of plaintiffs; and in decreeing that plaintiffs should have the right to go upon the lands of said defendant in the State of Nevada for the purpose of inspecting the measuring devices installed by defendant in its said ditches, canals and other conduits. (297-8.)

XI.

"The Court erred in making and entering its decree herein, in retaining jurisdiction for the purpose of making rules touching the manner of diverting, measuring and distributing said

waters, or for the purpose of making rules concerning the devices to be installed and used for diverting, measuring and distributing said waters, or for the purpose of directing the defendant, to keep records of the amounts of water diverted by said Vineyard Land and Stock Company or for the purpose of requiring defendants, or either of them, to make or file reports concerning the amounts of water diverted, or for the purpose of appointing commissioners or watermasters to make distribution of said waters, or for the purpose of making any order whatever touching the distribution, points of diversion, places of use, or methods of irrigation, in the use of said waters by the defendant, Vineyard Land and Stock Company, in connection with the irrigation of its lands in the State of Nevada." (298.)

By its decree the Court in substance provides (286-293) (a) that the Vineyard Land and Stock Company must use the waters constituting its prior rights as recognized by the decree, only upon such lands as are specifically described in the decree; (b) that said Company must install in its canals and ditches automatic measuring devices, and refrain from the use of any waters for the irrigation of its land except such as are diverted through canals and ditches provided with such automatic measuring de-

vices; (c) that the measuring devices so provided shall at all times be subject to the inspection of plaintiffs and that plaintiffs shall have access to the premises where such measuring devices are situated; (d) that the Court retain jurisdiction to make rules touching the manner of diverting, measuring and distributing the water and the devices to be installed and used for such purposes and to direct that the said defendant keep records of the amounts of water diverted, and to file reports thereof from time to time, and to enable the Court to appoint commissioners or wastermasters to make distribution of the waters in accordance with the terms of the decree; (e) that said defendant should have the right to divert from Goose Creek and its tributaries, at the rate of not to exceed six and one-half cubic feet per second of time for the Winecup Ranch; nine cubic feet per second of time for the Grande Ranch; and two and one-half cubic feet per second of time for the Spring Creek Ranch.

It will be seen at once that these provisions of the decree constitute very material restrictions upon the rights awarded to the defendant. They were inserted in the decree without any notice to defendant, and without any opportunity to the defendant to be heard with reference thereto. There is not a hint in the pleadings nor a suggestion at the trial that any such onerous provisions would be inserted in the decree. It is not putting it too strongly to say, there-

fore, that material rights belonging to the Vineyard Land and Stock Company have in effect been condemned for the benefit of the plaintiffs without pleading, proof, or other essentials of due process of law.

While it is freely conceded that a court of equity with jurisdiction over the persons of litigants, can, under some conditions, enjoin them from the performance of acts with respect to property outside of the territorial jurisdiction of the court, and can even go so far as to compel a party to perform affirmative acts for the abatement of a nuisance in a foreign state, where the injurious effect of such nuisance operates upon property or rights of one of the parties within the jurisdiction of the court (Salton Sea cases), yet we know of no case in which a court of equity has attempted to give ex-territorial operation to its decree to anything like the same extent as is attempted by the decree now under consideration. Generally speaking, the power to exercise injunctive control of a person with respect to property beyond the territorial jurisdiction of the court must be based upon duties or obligations growing out of trust, contract, or fraud. It is conceived that these furnish a basis for the exercise of control over the conscience of a party. In a few cases, and seemingly *ex necessitate rei,* injunctive relief has been granted in the case of torts committed beyond the jurisdiction of the court. (Rickey Land and Cattle Co. v. Miller and Lux, 152 Fed. 11; Willey v. Decker, 11 Wyo. 496;

Howell v. Johnson, 89 Fed. 556; Taylor v. Hulett, 15 Idaho, 255.) The principle of these cases was extended somewhat in the Salton Sea cases so as to compel the performance of such affirmative acts as were necessary (stopping the flow of water) to abate the nuisance complained of. In this decree, however, a more or less elaborate system of regulation and control directly affecting appellant's rights and property in Nevada is provided for. The court was not content to define the rights of appellant and to leave the matter of administration of such rights to the control of the state officials of Nevada, whose duties are imposed by the legislature of that state, but in addition to granting injunctive relief, the Court commands the performance of affirmative acts in no wise necessary in order to put an end to the operation in Idaho of any wrongful act of appellant in Nevada, and also attempts to regulate the internal affairs of appellant and to directly affect property and rights whose situs is in the foreign state. The placing of automatic measuring devices in the canals and ditches of appellant is clearly separable from the injunctive relief granted by the decree. It will not be contended that appellant would necessarily have any difficulty in rendering obedience to the injunction without the aid of such appliances. It may be said, indeed, that the use of automatic measuring devices is exclusively for the purpose of enabling appellees to inform themselves as to whether or not appellant is obeying the injunction. The consequences of the use or non-use of such measuring de-

vices could not possibly be said to operate in the State of Idaho so as to form any analogy to the decisions in the Salton Sea cases. The same thing may be said of the requirement of the decree that the appellant shall keep a record of the measurments of water and furnish the same to appellees. With respect to the attempt of the Court to saddle the lands of appellant with an easement in favor of appellees, or to give appellees a perpetual license to go upon and over the lands of appellant in Nevada at their pleasure, there is, we submit, no precedent. Of equal futility are those provisions of the decree whereby the Court assumes to retain jurisdiction for the purpose of regulating the appellant's conduct in Nevada and for the purpose, if needs be, of appointing commissioners for the purpose of going into Nevada and of there distributing water to appellant. We are unable to conceive of any basis for the exercise of such a power. Suppose the Court should appoint commissioners for the purposes named and that under the Court's order such commissioners should proceed into the foreign state and there assume to act under the authority of such order, can it be contended that they would act otherwise than as trespassers? In this connection it should be borne in mind that the State of Nevada by statute has provided for an extensive and elaborate system of water distribution by officers of its own creation. These officers are clothed with power to regulate head-gates, measuring devices and all other appliances deemed by them to be necessary or convenient in the diversion, distribution and use of

water. Is it conceivable that this decree could bar the exercise of these sovereign powers by the State of Nevada?

One of the most onerous and vital provisions of the decree to be discussed under this head is the one that enjoins appellant from using the waters constituting its prior right upon lands other than those mentioned in the decree. Regardless of the question as to whether the Court had jurisdiction with respect to this provision of the decree, its action in the premises is obviously erroneous. The question as to where the waters of the State of Nevada may be used is one that must be answered not by what a Court in a foreign state may provide, but by what the legislature of the State of Nevada enacts. In the language of Mr. Justice Field in Pennoyer v. Neff, 95 U. S., at 722:

> "The several states of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil *status* and capacities of its in-

habitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such persons or property in any other tribunals.' Story, Confl. Laws, sect. 539."

The State of Nevada through its legislature has at various times since its organization asserted ownership of all waters within the state and has provided methods not only for the appropriation of such waters, but also for the change of places of diversion, places of use and manner of use. In 1913 a complete codification of laws with reference to the appropriation and use of waters under state control was adopted by the legislature of Nevada. (Session Laws of Nevada for the year 1913, pp. 192-220.) Section 1 of the act provides:

> "The water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground, belongs to the public."

Section 52 provides:

> "There shall be appointed by the state board of irrigation one or more water commissioners for each water district, who shall receive a salary, including all expenses, of not more than five dollars ($5) per day for each day actually employed on the duties herein mentioned. Such water commissioner shall execute the laws prescribed in sections 53 to 58, inclusive, of this act, under the general direction of the state engineer. * * * "

Sections 53 to 58 provide:

> "Sec. 53. The state engineer shall divide the state into water districts to be so constituted as to insure the best protection for the water

user, and the most economical supervision on the part of the state. Said water districts shall not be created until a necessity therefor shall arise and shall be created from time to time as the priorities and claims to the streams of the state shall be determined.

"Sec. 54. It shall be the duty of the state engineer to divide or cause to be divided the waters of the natural streams or other sources of supply in the state, among the several ditches and reservoirs taking water therefrom, according to the rights of each, respectively, in whole or in part, and to shut or fasten, or cause to be shut or fastened, the head-gates or ditches, and to regulate, or cause to be regulated, the controlling works of reservoirs, as may be necessary to insure a proper distribution of the waters thereof. Such state engineer shall have authority to regulate the distribution of water among the various users under any partnership ditch or reservoir where rights have been adjudicated in accordance with existing decrees. Whenever, in pursuance of his duties, the water commissioner regulates a head-gate to a ditch or the controlling works of reservoirs, it shall be his duty to attach to such head-gate or controlling works a written notice properly dated and signed, setting forth the fact that such head-gate or controlling works has been properly regulated and is wholly under his control, and such no-

tice shall be a legal notice to all parties interested in the diversion and distribution of the water of such ditch or reservoir. It shall be the duty of the district attorney to appear for or in behalf of the state engineer or his duly authorized assistants in any case which may arise in the pursuance of the official duties of any such officer within the jurisdiction of said district attorney.

"Sec. 55. Any person who shall wilfully open, close, change or interfere with any lawfully established head-gate or water-box without authority, or who shall wilfully use water or conduct water into or through his ditch which has been lawfully denied him by the state engineer, his assistants or water commissioners, shall be deemed guilty of a misdemeanor.

"The possession or use of water when the same shall have been lawfully denied by the state engineer or other competent authority shall be *prima facie* evidence of the guilt of the person using it.

"Sec. 56. The owner or owners of any ditch or canal shall maintain to the satisfaction of the state engineer of the division in which the irrigation works are located, a substantial head-gate at or near the point where the water is diverted, which shall be of such construction that it can be locked and kept closed by the water commissioner; and such owners shall construct and maintain, when required by the state engineer, suitable measuring devices at

such points along such ditch as may be necessary for the purpose of assisting the water commissioner in determining the amount of water that is to be diverted into said ditch from the stream, or taken from it by the various users. Any and every owner or manager of a reservoir located across or upon the bed of a natural stream or of a reservoir which requires the use of a natural stream channel, shall be required to construct and maintain, when required by the state engineer, a measuring device of a plan to be approved by the state engineer, below such reservoir, and a measuring device above such reservoir, on each or every stream or source of supply discharging into such reservoir, for the purpose of assisting the state engineer or water commissioners in determining the amount of water to which appropriators are entitled and thereafter diverting it for such appropriators' use. When it may be necessary for the protection of other water users, the state engineer may require flumes to be installed along the line of any ditch. If any such owner or owners of irrigation works shall refuse or neglect to construct and put in such head-gates, flumes, or measuring devices after ten (10) days' notice, the state engineer may close such ditch, and the same shall not be opened or any water diverted from the source of supply, under the penalties prescribed by law for the opening of

head-gates lawfully closed until the requirements of the state engineer as to such headgate, flume, or measuring device have been complied with, and if any owner or manager of a reservoir located across the bed of a natural stream, or of a reservoir which requires the use of a natural stream channel, shall neglect or refuse to put in such measuring device after ten (10) days' notice by the state engineer, such state engineer may open the sluicegate or outlet of such reservoir and the same shall not be closed under the penalties of the law for changing or interfering with headgates, until the requirements of the state engineer as to such measuring devices are complied with.

"Sec. 57. The state engineer or his assistants shall have power to arrest any person violating any of the provisions of this act, and to turn them over to the sheriff, or other competent police officer within the county, and immediately on delivering any such person so arrested into the custody of the sheriff, it shall be the duty of said state engineer, or his assistant making such arrest, to immediately, in writing, and upon oath, make complaint before the justice of the peace against the person so arrested.

"Sec. 58. Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof

shall be fined in a sum not less than twenty-five dollars ($25), nor more than two hundred and fifty dollars ($250), together with the costs, or imprisoned in the county jail not exceeding six months, and not less than ten (10) days, or by both such fine and imprisonment."

In section 59 there are the following provisions:

"Any person desiring to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such appropriation, change in place of diversion, or change in manner of use or place of use, make an application to the state engineer for a permit to make the same. * * * Every application for permit to change the place of diversion, manner of use or place of use of water already appropriated, shall contain such information as may be necessary to a full understanding of the proposed change, as may be required by the state engineer. All applications for permit shall be accompanied or followed by such maps and drawings and such other data as may hereafter be prescribed by the state engineer, and such accompanying data shall be considered as part of the application."

In section 63 it is provided that:

"It shall be the duty of the state engineer to approve all applications made in proper form where all fees, as in this act provided, have

head-gates lawfully closed until the requirements of the state engineer as to such headgate, flume, or measuring device have been complied with, and if any owner or manager of a reservoir located across the bed of a natural stream, or of a reservoir which requires the use of a natural stream channel, shall neglect or refuse to put in such measuring device after ten (10) days' notice by the state engineer, such state engineer may open the sluicegate or outlet of such reservoir and the same shall not be closed under the penalties of the law for changing or interfering with headgates, until the requirements of the state engineer as to such measuring devices are complied with.

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In section 63 it is provided that:

"It shall be the duty of the state engineer to approve all applications made in proper form where all fees, as in this act provided, have

been paid, which contemplate the application of water to beneficial use, and where the proposed use or change does not tend to impair the value of existing rights, or be otherwise detrimental to the public welfare."

The act contains 90 sections in all and constitutes the present law of Nevada, except as amended in certain minor particulars by the legislature of 1915. Thus the State of Nevada has in the first place conferred upon appellant the right to change the place of diversion, place of use, or manner of use of its waters within that state. The Court, on the other hand, by its decree has absolutely foreclosed appellant from exercising this right. The conflict between the Court's decree and the laws of Nevada in this and other particulars to which reference has been made, is palpable and direct, and either the one or the other must yield.

The decree prohibits the Vineyard Land and Stock Company from irrigating other lands than those specifically described in the decree, even although such irrigation would not result in any increased consumption of water. In the new development to which reference has been made there are large areas of land that are better adapted for the cultivation of valuable crops than are some of the lands upon which the Court says the water may be used. These lands are located at no greater distance from the channel than the lands under the old irrigation; nevertheless, the appellant may not change the place of use so as to bring these other lands under

cultivation, even although it might do so without causing any injury to the appellees. Indeed, it might well be that with the water that is required to flood certain of the meadow-land, upon which crops of comparatively small value are produced, a much larger area of lands with better soil and better conditions generally might be brought under cultivation and caused to produce more valuable crops without the consumption of any more water.

The decree ignores the well recognized right of an owner of water to increase the effectiveness of its use. (Rodgers v. Pitt, 129 Fed. 932; 1 Wiel, Sec. 483.)

In conclusion, we desire to call the Court's attention to the principle announced in the case of Kansas v. Colorado, 206 U. S. 117, as it would seem that the doctrine laid down in that case is particularly applicable to the situation presented by the case now under consideration. The principle we refer to is contained in the following quotation from the opinion:

> "Summing up our conclusions, we are of the opinion that the contention of Colorado of two streams cannot be sustained; that the appropriation of the waters of the Arkansas by Colorado, for purposes of irrigation, has diminished the flow of water into the state of Kansas; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields and rendering possible their oc-

cupation and cultivation when otherwise they would have continued barren and unoccupied; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas Valley in Kansas, particularly those portions closest to the Colorado line, yet to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both States and the right of each to receive benefit through irrigation and in any other manner from the waters of this stream, we are not satisfied that Kansas has made out a case entitling it to a decree. At the same time it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits, and may rightfully call for relief against the action of Colorado, its corporations, and citizens, in appropriating the waters of the Arkansas for irrigation purposes."

It is conceded that a large part of the drainage area of Goose Creek is in the State of Nevada; also that the only benefit that the State of Nevada can derive from the waters of that stream or its tributaries, is that which results from the use of said waters by the Vineyard Land and Stock Company. It will also be conceded that these lands are located within a short distance of the channel, and that all of the

water used thereon for irrigation, with the exception of such as evaporates or is absorbed by plant life, will return to the channel.

Respectfully submitted,

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